

Pleas in Designated Cases

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17.1 Judges Who May Accept Pleas in Designated Cases

The judge who presides at a preliminary examination may accept a plea in the designated case. MCR 5.912(A)(2). Moreover, the juvenile has the right to demand that the same judge who accepted the plea in a designated case preside at sentencing or delayed imposition of sentence, but not at a juvenile disposition of the designated case. MCR 5.912(A)(3).*

*See Section 19.1
(court's options
following
conviction in
designated case).

17.2 Court Rules Governing Pleas in Designated Cases

MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. The rules governing designated proceedings, MCR 5.951 – 5.956, do not establish rules for guilty pleas in designated cases.

However, because designated proceedings in the Family Division are criminal proceedings, and the juvenile whose case is designated must be afforded all of the procedural protections and guarantees that an adult criminal defendant would receive, the rules governing pleas in adult criminal cases apply to designated cases. See MCL 712A.2d(7); MSA 27.3178(598.2d)(7), and MCR 5.903(D)(9).

Therefore, the court rules that govern guilty pleas and no contest pleas in designated cases are as follows:

F MCR 6.301 – 6.312 — Pleas in Felony Cases

F MCR 6.610(E) — Pleas in Misdemeanor Cases

NOTE: Because the vast majority of designated cases are felonies, the discussion that follows concerns itself with the court rule requirements in Subchapter 6.300. For a more detailed discussion of misdemeanor pleas, see Monograph 3, *Misdemeanor Arraignments and Pleas* (MJL, 1992).

17.3 Available Pleas

Subject to the rules in Subchapter 6.300, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived. MCR 6.301(A).

In addition, a defendant, with the consent of both the court and the prosecutor, may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. MCR 6.301(C)(2).*

*See Section 17.8, below, for a discussion of conditional pleas.

17.4 Court Rule Requirements for Guilty Pleas and No Contest Pleas

A defendant may enter a plea of nolo contendere only with the consent of the court. MCR 6.301(B).

In addition, there is no constitutional right to have a guilty plea accepted by the court. *North Carolina v Alford*, 400 US 25, 34–35; 91 S Ct 160; 27 L Ed 2d 162 (1970), citing *Lynch v Overholser*, 369 US 705, 719; 82 S Ct 1063; 8 L Ed 2d 211 (1962). Simply because a factual basis could have been inferred from the facts presented at the guilty plea hearing does not mean the court must accept the plea. The decision to accept or reject a plea is within the court's discretion. *People v Bryant*, 129 Mich App 574, 577–78 (1983). In addition, MCL 768.35; MSA 28.1058 (the “true plea doctrine”), requires the judge to refuse to accept a guilty plea, or to vacate an accepted plea, where he or she has “reason to doubt the truth of such plea.” See *People v Wolff*, 389 Mich 398, 404 (1973).

The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A). For constitutional requirements, see *People v Jaworski*, 387 Mich 21 (1972), *Boykin v Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274

(1969), and *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath and comply with Subrules (B)–(E). MCR 6.302(A).

A. An Understanding Plea*

MCR 6.302(B)(1)–(5) provides:

Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so the defendant gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be tried by the court without a jury, if the defendant chooses and the prosecutor and court consent;

(c) to be presumed innocent until proved guilty;

(d) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(e) to have the witnesses against the defendant appear at the trial;

(f) to question the witnesses against the defendant;

(g) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(h) to remain silent during the trial;

(i) to not have the defendant's silence used against the defendant; and

(j) to testify at the trial, if the defendant wants to testify;

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea; and

*See Section 17.12, below (case law requirements for understanding plea).

Section 17.5

*See Section 17.17, below.

*See Section 17.13, below (case law requirements for voluntary plea).

*See Sections 17.6 and 17.7, below, for a discussion of plea agreements.

*See Section 17.14, below (case law requirements for an accurate plea).

*See also Section 10.6 (special requirements for no contest pleas in delinquency cases).

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.*

B. A Voluntary Plea*

The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;*

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

MCR 6.302(C)(4)(a)–(c).

On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with MCR 6.302(B)–(D) (understanding, voluntary, accurate plea). If it appears to the court that it has failed to comply with Subrules (B)–(D), the court may not accept the defendant's plea until the deficiency is corrected. MCR 6.302(E).

C. An Accurate Plea*

If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. MCR 6.302(D)(1). See also *People v Botzen*, 151 Mich App 561, 565 (1986) (use of non-leading questions is the preferred practice).

17.5 Special Requirements for No Contest Pleas*

If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must:

(a) state why a plea of nolo contendere is appropriate, and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

MCR 6.302(D)(2)(a)–(b).

The judge must state on the record the reasons for accepting a nolo contendere plea, such as the defendant's reluctance to relate the details of a particularly sordid crime, the defendant's unclear recollection of the facts of the crime (where he was intoxicated or committed so many similar crimes that he cannot remember this one), or defendant's desire to avoid collateral

repercussions of the crime, such as civil litigation. *Guilty Plea Cases*, 395 Mich 96, 134 (1975).

When a nolo contendere plea is offered to a specific intent crime because the defendant was too intoxicated to remember the events in question, the prosecution must offer evidence refuting the intoxication defense. Without any refutation, the specific intent element is without a sufficient factual basis. *People v Polk*, 123 Mich App 737, 740–41 (1983).

A judge may properly rely solely on the preliminary examination to establish a factual basis for the plea of nolo contendere. *People v Chilton*, 394 Mich 34, 36 (1975), *People v Conville*, 55 Mich App 251, 254 (1974), and *People v Gonzales*, 70 Mich App 319, 324 (1976).

17.6 Plea Procedures When There Is a Plea Agreement to Lesser Charges

The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant. MCR 6.302(C)(1)–(2). See, generally, *Santobello v New York*, 404 US 257, 260; 92 S Ct 495; 30 L Ed 2d 427 (1971), and *People v Killebrew*, 416 Mich 189, 197 (1982).

MCR 6.301(D) states that the court may not accept a plea to an offense other than the one charged without the consent of the prosecutor. See *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 682–85 (1972), and *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115 (1974).

In *People v Grove*, 455 Mich 439, 464–65 (1997), the Court found no abuse of the trial court's discretion in refusing to accept the defendant's guilty pleas, made pursuant to a plea agreement, where the pleas were tendered after the "plea cutoff date" in a pretrial scheduling order. The trial judge may refuse to accept the defendant's plea "pursuant to the rules," which was interpreted to include MCR 2.401(B)(1)(b), governing pretrial scheduling orders.

Once the trial court accepts a plea induced by a plea agreement, the terms of the agreement must be fulfilled. *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971), *People v Brooks*, 396 Mich 118 (1976), and *People v Lawson*, 75 Mich App 726, 728–29 (1977). For examples of breaches of plea agreements, see *People v Shuler*, 188 Mich App 548, 549–50 (1991) (prosecutor agreed to minimum sentence of not more than 5 years; at sentencing, prosecutor recommended 5–20 years and violated "spirit of agreement" by adopting presentence report containing probation officer's sentencing recommendation), *People v Huizar*, 89 Mich App 224, 227 (1979) (when prosecutor promised unrepresented 17 year old to recommend probation but did not say anything about possibility of jail time in conjunction with probation, prosecutor violated agreement), and *People v Kean*, 204 Mich App 533, 535–36 (1994) (where part of the plea agreement

included the requirement that defendant be in a residential drug-alcohol treatment center, defendant violated the agreement by leaving the program after a week).

*See Section 16.5 (definition of court-designated case).

NOTE: There is no apparent prohibition against the court accepting a plea to a non-specified juvenile violation without holding a designation hearing.*

A. Remedies for Breaches of Plea Agreements

*See Sections 17.15 (withdrawal of pleas before sentencing) and 17.16 (challenges to pleas after sentencing), below.

Generally, if breach of a plea agreement is found, the reviewing court may choose between vacating the plea, allowing the defendant to withdraw the plea, or ordering specific performance. *People v Peters*, 128 Mich App 292, 295 (1983).^{*} The remedy is left to the discretion of the trial judge, but the defendant's preference is accorded considerable weight. *People v Christian*, 68 Mich App 480, 482–83 (1976), and *People v Jennings*, 178 Mich App 334, 336–37 (1989).

Whether specific performance of a promise may be had depends upon who made the promise and the nature of the promise. See, for example:

- F *People v Gallego*, 430 Mich 443, 452–57 (1988) (prosecutor was not bound by a police promise not to prosecute, but evidence was suppressed as a result of the police promise);
- F *People v Nixten*, 183 Mich App 95, 98–99 (1990) (prosecutor's promise to make sentence recommendation was specifically enforced);
- F *People v Johnson*, 122 Mich App 26, 29–30 (1982) (specific performance, rather than plea withdrawal, was the proper remedy because prosecutor violated agreement and defendant was not asserting his innocence);
- F *People v Reagan*, 395 Mich 306, 318 (1975) (where prosecutor agreed to dismiss charges if the defendant passed a polygraph examination, and defendant passed, the agreement must be enforced as matter of public policy);
- F *People v Johnson*, 210 Mich App 630, 632–35 (1995) (trial court's addition of probation conditions not within the sentence bargain did not entitle defendant to specific performance or plea withdrawal, as probation terms may be altered at any time).

B. Admissibility of Statements Made During Plea Negotiations

Statements made during plea negotiation are inadmissible under MRE 410. Whether negotiation occurred depends on defendant's subjective belief and the reasonableness of that belief in light of the circumstances. *People v Manges*, 134 Mich App 49, 59–60 (1984), citing *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978). Defendant's incriminating statements on the day of his arrest were admissible under MRE 410, as

there was no indication that he reasonably expected to negotiate a plea at the time of making the statements. *People v Hannold*, 217 Mich App 382, 391 (1996).

17.7 Plea Procedures When There Is a Sentence Agreement

A. Court's Options When Presented With Sentence Agreement

If there is a plea agreement and the terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may:

- (a) reject the agreement, or
- (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor, or
- (c) accept the agreement without having considered the presentence report, or
- (d) take the plea agreement under advisement.

MCR 6.302(C)(3)(a)–(d).

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement. MCR 6.302(C)(3).

A court may not accept a plea agreement containing a sentence bargain and then impose a lower sentence than that agreed to without allowing the prosecuting attorney the option of withdrawing from the agreement. The defendant is not entitled to specific performance; rather, the court must inform the prosecutor of the sentence it intends to impose and offer the prosecutor the opportunity to withdraw from the bargain. *People v Siebert (After Remand)*, 450 Mich 500, 504 (1995).

B. Judicial Participation in "Sentence Bargaining"

In *People v Killebrew*, 416 Mich 189 (1982), the Michigan Supreme Court outlined procedures governing judicial participation in sentence bargaining. The judge was not to participate in the plea negotiations themselves. *Id.*, at 205. Whether the product of the negotiation was a sentence agreement or a sentence recommendation by the prosecutor, the court was not bound by the agreement. If the court rejected the agreement, the defendant was allowed to withdraw his plea. *Id.*, at 207, 209–10. In *People v Cobbs*, 443 Mich 276, 283 (1993), the Court

modified the procedures outlined in *Killebrew* by imposing the following limitations:

- F In response to a request by a party, the judge may state on the record the sentence that, considering the information then available, seems appropriate for the charged offense. The judge may not indicate or suggest that the defendant will receive a longer sentence if he or she declines the offer to plead guilty and proceeds to trial.
- F The preliminary evaluation is not binding on the judge, but the defendant has a right to withdraw his or her plea if the judge later decides to exceed the initial evaluation. See also *Killebrew*, *supra*, at 207 (court must defer final acceptance of the agreement until after it examines the presentence report).

C. Acceptance of Sentence Agreement

A defendant whose plea is accepted and who is sentenced pursuant to a plea bargain and sentencing agreement waives his right to challenge the sentence unless there is also an attempt and a sound legal reason to withdraw the plea. *People v Blount*, 197 Mich App 174 (1992).

D. Court's Discretion to Reject Plea Agreement and Underlying Plea

The trial court has discretion under MCR 6.302(C)(3)(a) to reject the entire plea agreement, including the underlying plea, where the agreement includes either a sentence agreement or a sentence recommendation by the prosecutor. The decision whether to accept or reject a bargained plea, on the basis of whether acceptance of the proffered plea represents an undue interference with the judge's sentencing discretion, given the facts of an individual case, is a proper exercise of the court's discretion. *People v Grove*, 455 Mich 439, 455–56, 460 (1997). See also *People v Killebrew*, 416 Mich 189, 211 (1982) (trial judge retains discretion to reject plea if agreement is deemed inappropriate).

Where a trial court refuses to accept a plea proposal that recommends a particular sentence, the court must indicate to the accused the sentence the court intends to impose prior to the accused's decision whether to withdraw the plea. *People v Scott*, 197 Mich App 28, 33 (1992), and *People v Killebrew*, 416 Mich 189, 209–10 (1982).

E. Taking the Plea Under Advisement

The court may take the plea under advisement. A verbatim record must be made of the plea proceeding. MCR 6.302(F). This procedure is commonly used to allow the court to consider a sentence agreement or recommendation.

17.8 Conditional Pleas

A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only. MCR 6.301(C)(2).*

*See Section 17.17, below (appeals of pleas to the court of appeals).

17.9 Pleas of Guilty but Mentally Ill

MCR 6.303 states that before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302.* In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, but not insane, at the time of the offense to which the plea is entered. The reports must be made a part of the record.

*See Section 17.4, above (court rule requirements for pleas).

17.10 Pleas of Not Guilty by Reason of Insanity

A. Required Advice to Defendant

MCR 6.304(A) provides that before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302* except that MCR 6.304(C), rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

*See Section 17.4, above (court rule requirements for pleas).

After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center of forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time. MCR 6.304(B).

B. Establishing Factual Basis for Plea

Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that:

- (1) the defendant committed the acts charged, and
- (2) a reasonable doubt exists about the defendant's legal sanity at the time of the offense.

MCR 6.304(C)(1)–(2).

C. Submission of Record to Forensic Center

After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime. MCR 6.304(D).

17.11 Guilty Pleas to Open Murder

When a defendant enters a guilty plea to an open charge of murder under MCL 750.318; MSA 28.550, the trial judge must conduct a hearing to determine whether the crime committed was first- or second-degree murder. If, based on the evidence at the hearing, the judge determines that a charge of manslaughter is warranted, but murder is not, the judge should refuse to accept the guilty plea to murder. *People v Middleton*, 22 Mich App 694, 696–97 (1970). When the plea is to second-degree murder, no hearing is required, *People v McCurtis*, 19 Mich App 353, 355 (1969), and the judge is without authority to accept a plea to manslaughter on its own motion. *People v Grillo*, 319 Mich 586, 590 (1948).

17.12 Case Law Requirements for an Understanding Plea

The trial court must strictly comply with the requirement that the defendant be advised of the maximum possible sentence and any mandatory minimum sentence. *People v Jones*, 412 Mich 407 (1981), and *People v Haynes (After Remand)*, 221 Mich App 551, 558–63, 565–68, 571–75 (1997) (where automatically waived juvenile defendants were informed before entering guilty pleas to first-degree murder that they could be sentenced to mandatory life imprisonment if the court chose to sentence them as adults, the juveniles' pleas were knowing and intelligent).

The trial court is not required to advise the defendant:

- F that a plea will waive appellate review of pretrial rulings, *People v Sundling*, 153 Mich App 277, 282 (1986);*
- F that he or she has the right to a speedy trial, *People v Hays*, 164 Mich App 7, 16 (1987);*
- F that consecutive sentencing is required, *People v Brooks*, 135 Mich App 193, 194 (1984);* or
- F of the recommended minimum sentence range under the sentencing guidelines, *People v Broden*, 428 Mich 343, 355 (1987).*

The use of a guilty plea form does not excuse the plea-taking judge from personally addressing the defendant to advise him of his rights. *People v Greeley*, 419 Mich 857 (1984), *People v Lee*, 125 Mich App 714, 716–17 (1983), and *People v Tallieu*, 132 Mich App 402, 404–07 (1984).

*See Section 17.17(A)–(C), below.

*See Section 18.6.

*See Section 20.8.

*See Sections 20.9–20.13.

The court is not required to explain possible defenses to the defendant at the guilty plea hearing. MCR 6.302(B)(1), *People v Burton*, 396 Mich 238, 241 (1976), and *People v Booth*, 414 Mich 343, 362 (1982).

Advice by the trial court judge that a plea would waive the rights that go along with a trial, and inquiry whether defendant had any questions about “any of the rights in connection with the trial,” was not an acceptable substitute for the colloquy required by MCR 6.302(B)–(E), as it neither insured that defendant knew what rights he would be waiving nor allowed the court to observe and evaluate defendant's demeanor and understanding. *People v Richardson*, 144 Mich App 616, 617–19 (1985).

17.13 Case Law Requirements for a Voluntary Plea

“In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary, by one competent to know the consequences, and, should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.” *In re Valle*, 364 Mich 471, 477 (1961). However, a plea bargain will be upheld where the value of the bargain is genuine and known to the defendant. *People v Mrozek*, 147 Mich App 304, 306–07 (1985), *People v Sledge (On Rehearing)*, 200 Mich App 326 (1993), and *People v Peters*, 95 Mich App 589, 592 (1980) (where 16-year-old defendant pled guilty to armed robbery in exchange for dismissal of felony murder charge, plea bargain was not illusory).

Entering a guilty plea in order to avoid extended incarceration does not make the plea involuntary. *People v Smith*, 182 Mich App 436, 442 (1990). See also *Bordenkircher v Hayes*, 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978) (guilty plea was not unlawfully compelled by threat of prosecution on more serious charges).

If the evidence establishes that the prosecutor or the judge has made a statement which, fairly interpreted by the defendant, is a promise of leniency, and the assurance is unfulfilled, the plea may be withdrawn. The defendant need not establish the existence of the promise of leniency beyond a reasonable doubt. *In re Valle*, 364 Mich 471, 477–78 (1961). Misleading information from defense counsel may also constitute a promise of leniency. *People v Flores*, 90 Mich App 223 (1979).

A guilty plea may also be found involuntary if it was based upon a bargain that was in fact of no value to the defendant. *People v Falkenberg*, 124 Mich App 173, 175–76 (1983) (where defendant's plea was induced by prosecutor's promise that he would recommend concurrent sentences, the promise was illusory because the defendant could not have been given consecutive sentences). But *if the facts of a particular case* show that the plea was nevertheless voluntary, the lack of consideration may not negate the agreement. See *People v Rowe*, 85 Mich App 106, 108–09 (1978) (where, as part of agreement, prosecutor agreed to dismiss charge of which defendant could not have been convicted, plea was nevertheless voluntary), *People v James*, 90 Mich App 424, 427–28 (1979) (where, as part of agreement, prosecutor agreed not to charge defendant as habitual offender,

and defendant had not been previously convicted of a felony, plea was nevertheless voluntary because that part of agreement was not an inducement for plea).

17.14 Case Law Requirements for an Accurate Plea

The test for determining the adequacy of the factual basis of a plea is whether the trier of fact could properly convict on the facts as stated by the defendant. *Guilty Plea Cases*, 395 Mich 96, 128–32 (1975), *People v Haack*, 396 Mich 367, 376–77 (1976), and *People v White*, 411 Mich 366, 381–82 (1981). Where the trial court has made a conscientious effort to establish a factual basis for the guilty plea by directly questioning the defendant, omissions in the factual basis may be remedied by questioning other witnesses, *People v Sees*, 104 Mich App 477, 481 (1981), or by viewing photographs of the injuries resulting from defendant's action, *People v Martinez*, 123 Mich App 145, 147 (1983). However, this supplementary procedure may be used only where the defendant has otherwise substantially admitted his guilt and the missing factual element was due to an oversight by judge or prosecutor. *People v Brown*, 96 Mich App 565, 572 (1980).

*See Section 17.5, above (special requirements for no contest pleas).

Where defendant fails to substantially admit her guilt at a guilty plea hearing, the procedural requirements of the court rule cannot be avoided by the parties' stipulation to the admission of other evidence to support the plea. Instead, the appropriate plea is *nolo contendere*, if the court can state adequate reasons for the acceptance of such a plea. *People v Martinez*, 123 Mich App 145, 147 (1983).*

A plea of guilty may be accepted even though a defendant asserts that he was intoxicated at the time the offense was committed, as long as the defendant sufficiently recalls facts and circumstances which tend to show that he participated in the commission of the offense. *People v Burton*, 396 Mich 238, 241–42 (1976).

Where a defendant claims that, because of intoxication, he or she does not recall committing an offense but still desires to plead guilty, the people should produce evidence negating the intoxication defense. The evidence may come from the preliminary examination transcript. *People v Stoner*, 23 Mich App 598, 608 (1970). However, this need not be done for general intent crimes, since intoxication is a defense only to specific intent crimes. *People v Booth*, 414 Mich 343, 361–62 (1982).

17.15 Withdrawal of Pleas Before Sentencing

The defendant has the right to withdraw any plea before the court accepts it on the record. MCR 6.310(A).

MCR 6.310(B) states that on the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would

substantially prejudice the prosecutor because of reliance on the plea. *People v Gomer*, 206 Mich App 55, 57 (1994). A trial court, on its own motion, may not vacate an accepted guilty plea at the sentencing hearing without the defendant's consent. *People v Strong*, 213 Mich App 107, 110–13 (1995).

Once the defendant establishes a fair and just reason for plea withdrawal under MCR 6.310(B), the burden shifts to the prosecuting attorney to establish that substantial prejudice would result if withdrawal were allowed. *People v Jackson*, 203 Mich App 607, 613 (1994) (bad legal advice of defense counsel alone was insufficient to shift the burden to prosecutor), and *People v Spencer*, 192 Mich App 146, 151 (1991) (prosecutor must show that the ability to prosecute the defendant would be hampered by withdrawal).

If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if the withdrawal would be required by MCR 6.311(B). MCR 6.310(B).*

A defendant who claims that he pled guilty because of promises of leniency that were subsequently broken is entitled to an evidentiary hearing to make a record on his assertions. *People v Johnson*, 386 Mich 305, 314 (1971), and *People v Sledge (On Rehearing)*, 200 Mich App 326, 330 (1993). However, a motion to withdraw the plea must be supported by some evidence other than the defendant's post-conviction allegation, *People v Schirle*, 105 Mich App 381, 385 (1981), and the trial court must find by a preponderance of the evidence that the plea was a product of fraud, duress, or coercion, *People v Taylor*, 383 Mich 338, 361 (1970).

There is no absolute right to withdraw a plea after it has been accepted by the court. *People v Jones*, 190 Mich App 509, 512 (1991). MCR 6.310(C) states that on the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement.

*See Section 17.16(B), below (remedy for error in plea proceeding).

17.16 Challenging Pleas After Sentencing

A. Time Requirements for Motion to Withdraw Plea

*See Section 17.17, below, for a discussion of time requirements for appeals of pleas.

MCR 6.311(A) allows the defendant to file a motion to withdraw the plea within the time for filing an application for leave to appeal.* After the time for filing an application for leave, the defendant may seek relief in accordance with the procedure set forth in Subchapter 6.500, dealing with post-appeal relief.

NOTE: MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. However, the juvenile whose case is designated “is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction.” MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Subchapter 5.900 does not incorporate by reference Subchapter 6.500, which governs post-appeal relief in criminal cases.

B. Remedy for Error in Plea Proceeding

If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and the inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals. MCR 6.311(B).

C. Preservation of Issues for Appeal

MCR 6.311(C) states that a defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not understanding, voluntary, or accurate, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal. *People v Quinn*, 194 Mich App 250, 254 (1992). Exceptions to this rule are:

- F rulings that are the subject of conditional pleas, *People v Reid*, 420 Mich 326, 331–32 (1984);*
- F where a jurisdictional issue is raised and the record is adequate, *People v New*, 427 Mich 482, 495 (1986);* and

*See Section 17.8, above.

*See Section 17.17(B)–(C), below.

- F where the court completely fails to inform the defendant on the record of the rights enumerated in MCR 6.302, *People v Quinn*, 194 Mich App 250, 254 (1992).*

*See Section 17.4, above.

D. Plea Withdrawal in Court's Discretion

There is no absolute right to withdraw a plea after it has been accepted by the court. *People v Eloby (After Remand)*, 215 Mich App 472, 474 (1996). The sentencing court has the discretion to grant plea withdrawal when the motion is brought after sentencing. *People v Montrose (After Remand)*, 201 Mich App 378, 380 (1993). A claim of innocence is normally a prerequisite for a post-sentencing motion to withdraw a plea, unless there is a claimed violation of the court rules or unfulfilled promise of leniency. *People v Lewis*, 176 Mich App 690, 694 (1989), citing *People v Scott*, 115 Mich App 273, 276–77 (1982) (where defendant asserted his innocence at sentencing but failed to show how his factual recital supporting his guilty plea was faulty, trial court did not abuse its discretion in finding defendant's motion to withdraw plea was frivolous), and *People v Sledge (On Rehearing)*, 200 Mich App 326, 330 (1993) (defendant was entitled to an evidentiary hearing where he claimed that his plea was induced by an unfulfilled promise of leniency by defense counsel).

Requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that defendant's true motivation for moving to withdraw is a concern regarding sentencing. *People v Haynes*, 221 Mich App 551, 559 (1997). See also *People v Effinger*, 212 Mich App 67, 71 (1995) (guilty plea to first-degree murder is not, by itself, proof of ineffective assistance of counsel).

E. Effect of Plea Withdrawal

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered. MCR 6.312 and *People v Mazzie*, 137 Mich App 60, 67–68 (1984).

17.17 Appeals of Pleas to the Court of Appeals*

In 1994, Michigan voters approved Proposal B to amend Const 1963, art 1, § 20, to provide that an appeal by a defendant who pleads guilty or nolo contendere shall be by leave of the Court of Appeals rather than by right. Proposal B was then implemented by the legislature. See MCL 770.3(1); MSA 28.1100(1), MCL 600.308; MSA 27A.308, MCL 600.309; MSA 27A.309.

MCR 7.205(F)(3) requires the application for leave to appeal to be filed within 12 months of sentencing unless one of the exceptions in MCR 7.205(F)(4) applies.

*See also Section 20.40(B) for required advice concerning a juvenile's rights to appeal and appellate counsel.

A. Plea Waiver Doctrine

The entry of a guilty or nolo contendere plea constitutes a waiver of all issues except “jurisdictional issues,” which would preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt. *People v New*, 427 Mich 482, 491 (1986). While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application for leave to appeal only. MCR 6.301(C)(2).

B. Issues Not Waived by Guilty or No Contest Plea

“Jurisdictional issues” include:

- F double jeopardy violation, *People v Feazel*, 219 Mich App 618, 621 (1996), and *People v Artman*, 218 Mich App 236, 244 (1996);
- F prosecution under wrong statute, *People v Kotesky*, 190 Mich App 330, 331 (1991), *People v Vannoy*, 106 Mich App 404, 411 (1981), and *People v Beckner*, 92 Mich App 166, 169 (1979);
- F determination of mental competency, *People v Parney*, 74 Mich App 173, 175–76 (1977);
- F challenge to sufficiency of factual basis for plea, *People v Mitchell*, 431 Mich 744, 748 (1988). Note that a defendant must move to withdraw a plea in the trial court before raising an issue on appeal concerning the adequacy of the factual basis for the plea, *People v Allen*, 168 Mich App 77 (1988), and MCR 6.311(C);*
- F insufficient notice of the charge, *People v Hanson*, 178 Mich App 507, 511 (1989) (probation violation);
- F legality of conviction of a nonexistent offense, *People v Hammond*, 187 Mich App 105, 107–13 (1991) (“conspiracy to commit second-degree murder”);
- F prosecution under superseded statute, *People v Johnson*, 207 Mich App 263, 264–65 (1994);
- F entrapment claim, if timely raised, *People v Crall*, 444 Mich 463, 465 (1993); and
- F constitutionality of statute supporting conviction, if the issue is first raised in the trial court, *People v Ghosh*, 188 Mich App 545, 546 (1991).

*See Section 17.16(C), above.

C. Issues Waived by Guilty or No Contest Plea

Among the issues waived by an unconditional plea are:

- F defects in arraignment, *People v Warner*, 17 Mich App 1, 2 (1969);*

*See Chapter 16, Part II.

- F violation of rule requiring timely preliminary examination, *People v Dunson*, 139 Mich App 511, 514 (1984);*
- F speedy trial, *People v Depifanio*, 192 Mich App 257 (1991) (waiver of statutory as well as constitutional right to a speedy trial);*
- F insanity defense, *People v Stammer*, 179 Mich App 432, 439–40 (1989);
- F claim that plea was result of promises or threats not disclosed to court at plea proceeding, or claim that it was not defendant's own choice to enter plea. MCR 6.302(B)(4);*
- F suppression of evidence, *People v Perez*, 143 Mich App 718, 719 (1985) (probable cause to search and compliance with “knock and announce” statute), *People v West*, 159 Mich App 424, 425 (1987) (warrantless search), *People v Hutchinson*, 155 Mich App 84, 87–88 (1986) (admissibility of defendant's statement), and *People v Eubank*, 121 Mich App 227, 229–30 (1982) (errors in identification procedure);
- F challenge to the proportionality of sentence that was part of plea bargain and sentencing agreement, *People v Blount*, 197 Mich App 174 (1992);* and
- F ineffective assistance of counsel claims, *People v Vonins (After Remand)*, 203 Mich App 173, 175 (1993), but there may be exceptions where counsel's conduct or omissions rendered the plea involuntary or not understanding, *People v Stammer*, 179 Mich App 432, 441 (1989).

*See Section
16.28.

*See Section 18.6.

*See Section
17.4(A), above.

*See Section
20.10.

